Filed 7/25/19 Mar East Realty, LLC v. Handley CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MAR EAST REALTY, LLC Plaintiff and Respondent, v. JULIA HANDLEY, Defendant and Appellant.	A152326, A152830 (Marin County Super. Ct. No. CIV1402908)

In these consolidated appeals, the seller of a waterfront home located in Tiburon, California appeals a judgment that was entered in favor of the buyer after the trial court directed a verdict at trial holding the seller breached the parties' contract of sale. The seller's liability was based on the undisputed fact that, subsequent to the sale, the parties discovered that the concrete stairway abutting the house, which provides the residents sole access to the water and to portions of the house's exterior, encroaches on the neighboring parcel. In addition to appealing the judgment (and a related order denying its motion for judgment notwithstanding the verdict), the seller also appeals a post-judgment order awarding the buyer hundreds of thousands of dollars in prevailing party attorney fees.

We reverse. There is no substantial evidence that the seller breached the parties' contract because the encroachment they came to discover after the transaction closed is an encumbrance on title and yet their contract specifically provides that the buyer would take title to the property subject to all encumbrances. Accordingly, this is a classic case

of "buyer beware." Because the seller is not liable, there also is no basis for an award to the buyer of prevailing party attorney fees and costs.

BACKGROUND[1]

The property in question is a waterfront, single-family home located at 2308 Mar East Street in Tiburon, California. The property's owner, a family trust of which appellant Julia Handley is a trustee, also owned the duplex next door, located at 2310 Mar East Street.

A concrete retaining wall runs between the two buildings, with a concrete stairway on each side of the retaining wall. Historically, the residents of 2308 Mar East have always used the stairway on their side of the retaining wall to access the home, and the residents of the neighboring duplex have always used the stairway on the opposite side of the retaining wall.

The concrete stairway on the 2308 Mar East side is physically attached to the house, intersecting with its concrete foundation and enclosed at the top by a gate that also is attached to the house. The stairway provides the only outside access to most of the house's exterior (to all but the front), to the area underneath the house, and to the waterfront. The stairway terminates near the waterfront at a landing that connects to a rear courtyard of the neighboring duplex.

In 2011, Handley in her capacity as trustee entered into a written contract to sell the home to Peter Wilton, a former professor at the Haas School of Business who owns multiple residences as investments. Wilton then formed a limited liability company to hold the property, called Mar East Realty, LLC (MER).

At the time of the sale, both the seller and the buyer believed that the concrete stairway lay within the property's boundaries. And, indeed, Wilton had had unfettered access to the stairs from the time he first visited the property before making an offer until the sale closed.

---

[1] The parties' briefing is lengthy and factually detailed. We presume their familiarity with specifics not summarized here, which are unnecessary to our decision.

Nevertheless, their written contract put Wilton on notice that "Seller may not be aware of all defects affecting the Property or other factors that Buyer considers important" and "strongly advised" Wilton "to conduct investigations of the entire Property in order to determine its present condition." The contract specifically disclaimed any representations about the property's boundary lines, and cautioned the buyer to get his own survey before closing the sale.[2] It also states (§ 12B): "Title is taken in its present condition subject to all encumbrances, easements, covenants, conditions, restrictions, rights and other matters, whether of record or not, as of the date of Acceptance . . . ."

Wilton didn't get a survey before the sale closed. He just didn't think he needed to.

---

[2] Section 10(A) of the offer, entitled "**BUYER'S INVESTIGATION OF PROPERTY AND MATTERS AFFFECTING PROPERTY**," stated in relevant part: "*Buyer's acceptance of the condition of, and any other matter affecting the Property, is a contingency of this Agreement* as specified in this paragraph and paragraph 14B [governing time periods, removal of contingencies and cancellation of rights]. Within the time specified in paragraph 14B(1), Buyer shall have the right, at Buyer's expense unless otherwise agreed, to conduct inspections, investigations, tests, *surveys* and other studies ('Buyer Investigations'), including, but not limited to, the right to: . . . (v) satisfy Buyer as to any matter specified in the attached Buyer's Inspection Advisory (C.A.R. Form BIA)." (Italics added.)

In turn, section E of the attached "Buyer's Inspection Advisory," which Wilton personally initialed, states in relevant part: "**YOU ARE ADVISED TO CONDUCT INVESTIGATIONS OF THE ENTIRE PROPERTY, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING: [¶] . . . [¶] 2. SQUARE FOOTAGE, AGE, BOUNDARIES:** Square footage, room dimensions, lot size, age of improvements and boundaries. Any numerical statements regarding these items are APPROXIMATIONS ONLY and *have not been verified by Seller* and cannot be verified by Brokers. *Fences, hedges, walls, retaining walls and other natural or constructed barriers or markers do not necessarily identify true Property boundaries*. (Professionals such as appraisers, architects, surveyors and civil engineers are best suited to determine square footage, dimensions and boundaries of the Property)." (Italics added.)

After the sale closed, though, he commissioned a survey in connection with remodeling work he wanted to undertake. His survey brought to light the fact that the four-foot wide stairway straddles the property line, with only six inches of it on his side.

This discovery prompted negotiations for an easement, at a time when Handley was in the process of selling the neighboring duplex to a third party, David Kulik. In the midst of the easement negotiations, Handley closed on the sale to Kulik, and then the relationship between the two new neighbors soured without any resolution of the stairway issue.

Wilton's limited liability company, MER, brought suit against Handley for breach of contract and misrepresentation. MER also asserted a quiet title claim against the new owner of the neighboring duplex, who eventually settled and granted Wilton an easement for the stairway.

MER's claims against Handley proceeded to a 10-day jury trial. Its theory of trial was that Handley had failed to convey over 90 percent of the stairs and, in doing so, breached paragraph 8 of the contract. That provision, which pertains to fixtures, states in pertinent part: "**ITEMS INCLUDED IN AND EXCLUDED FROM PURCHASE PRICE:** [¶] . . . [¶] **B. ITEMS INCLUDED IN SALE:** (1) All EXISTING fixtures and fittings that are attached to the Property; [¶] . . . [¶] (4) Seller represents that all items included in the purchase price, unless otherwise specified, are owned by Seller."[3]

After the close of evidence, the court granted a motion by Wilton for a directed verdict on this claim. It concluded as a matter of law that the stairs were a fixture, and that Handley had breached the contract by failing to convey them in the sale.[4] It then submitted the issue of contract damages to the jury, which awarded MER $97,772. Following the entry of judgment on the jury's verdict, Handley moved unsuccessfully for JNOV and for a new trial, and thereafter the court awarded MER $608,596 in attorney

---

[3] That breach of contract theory differed from the theory it had pled. No issue has been raised concerning that variance, however.

[4] By contrast, the court granted a nonsuit for Handley on MER's tort claims, thereby removing them from the case. MER has not challenged that ruling on appeal.

fees, expert witness fees pursuant to Code of Civil Procedure section 998, and costs. Handley has timely appealed from the judgment, the order denying JNOV, and the post-judgment award of attorney fees and costs. At her unopposed request, we consolidated the appeal from the judgment with the appeal from the post-judgment attorney fee award.

DISCUSSION

Handley challenges many rulings on appeal, but the issue of contractual liability is dispositive of everything. She argues, and we agree, that the trial court erred in directing a verdict on liability and, subsequently, in denying her JNOV motion because there is no substantial evidence she breached the parties' contract.

I.

Standard of Review

"We review the trial court's entry of a directed verdict de novo. [Citation.] A directed verdict . . . is proper if, after disregarding conflicting evidence and drawing every legitimate inference in favor of the [non-moving party], there is ' "no evidence of sufficient substantiality to support a verdict in favor of" ' the [non-moving party]. [Citation.] In ruling on the motion, the trial court may not weigh the evidence, consider conflicting evidence or judge the credibility of witnesses. [Citation.] Appellate review of an order granting a directed verdict is quite strict, with all inferences and presumption drawn against such orders. [Citation.] The reviewing court must view the evidence in the light most favorable to the [non-moving party], resolve all conflicts in the evidence and draw all inferences in the [non-moving party's] favor, and disregard conflicting evidence." (*Guillory v. Hill* (2015) 233 Cal.App.4th 240, 249.) " 'A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant.' " (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 359.)

The same standards apply to our review of an order denying JNOV. "A party is entitled to judgment notwithstanding the verdict only if there is 'no substantial evidence [to] support' that verdict. [Citations.] In reviewing a trial court's denial of a motion for

judgment notwithstanding the verdict, we ask: Does the record, viewed in the light most favorable to the . . . verdict, contain evidence that is reasonable, credible and of solid value sufficient to support the . . . verdict? [Citations.] If we must resolve any legal issues in answering this question, our review of such issues is de novo." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 890.) In addition, "[i]f the motion for judgment notwithstanding the verdict is denied . . . the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict. (Code Civ. Proc., § 629, subd. (c).)

II.

Analysis

Handley's argument on contractual liability encompasses a number of points, several of them made in the alternative, but it is necessary to address only the one that is the most straightforward.

That is, even if we assume the entire stairway is a "fixture" that the parties intended to convey pursuant to section 8 of their contract, the buyer expressly agreed, in section 12B of the contract, to take title "subject to all encumbrances." *Quality Wash Group V Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687 (*Quality Wash Group*), which both parties discuss, holds that a fixture that encroaches on adjoining property is an "encumbrance" on property title. (See *id*. at pp. 1694–1695.) It applied the standard announced in an earlier case involving the encroachment of an *entire house* on a neighboring parcel (see *Johnson v. Bridge* (1923) 60 Cal.App. 629 (*Johnson*)): that " '[a]s applied to an estate in land, an encumbrance may include whatever charges, burdens, obstructs, or impairs its use or impedes its transfer.' " (See *Quality Wash Group*, at p. 1694, quoting *Johnson*, 60 Cal.App. at p. 632; see also 1 Miller & Starr, Cal. Real Estate (4th ed. 2019) § 2:18, fn. 6, pp. 2-100 to 2-101, and accompanying text [discussing *Johnson* standard].)

In *Quality Wash Group*, the seller warranted to the buyer in their contract of sale that title was *free* of encumbrances, and so the encroaching fixtures were held to breach their sales contract (specifically, the warranty clause). (See *Quality Wash Group*, *supra*, 50 Cal.App.4th at pp. 1693–1695; accord, *Johnson, supra*, 60 Cal.App. at p. 632 [encroachment of house on neighboring property was "a substantial incumbrance upon the property contracted for and one which the [seller] had agreed by her contract to insure against" pursuant to warranty to transfer property free of all incumbrances].)

Here, by contrast, we have the opposite situation. Not only did the seller give no such warranty, affirmatively disclaim any representations about the true property boundary and urge the buyer to get his own survey (§ 10A), but the buyer took title "subject to" any such encumbrances (§ 12B). This means that, even if the stairway was a "fixture" of the property that Handley agreed to convey under section 8, she did not breach section 8 by transferring less than full title to the stairway because the encroachment was a risk *the buyer* expressly assumed under section 12B.

MER's arguments to the contrary are not persuasive. In its briefing, MER does not address section 12B providing for the conveyance of title "subject to all encumbrances." Instead, it relies principally on section 8 (quoted *ante*), pursuant to which Handley warranted that she *owned* the fixtures included in the sale. Although this language appears to be somewhat in tension with section 12B, we must, if possible, harmonize provisions of a contract that appear to be contradictory and inconsistent so as to give effect to each. (See *Southern Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 822; Civ. Code, § 1641.) And here, we can. Again, assuming the stairway was a fixture, the ownership language of section 8 upon which MER relies is merely a representation about the *fact* of title; it is not a representation about the nature of title (that is, whether ownership is free of any encumbrance). As *Quality Wash Group* demonstrates, owning a fixture doesn't preclude the possibility that the fixture might encroach on neighboring land (and therefore constitute an encumbrance). Indeed, even owning a *house* doesn't preclude the possibility of the house encroaching on neighboring property. (See *Johnson, supra*, 60 Cal.App. 629.) Encumbered or unencumbered, title is

title. Harmonizing section 8 of the contract with section 12B, the only reasonable interpretation of the contract (assuming the stairway is a fixture) is that Handley warranted that title to the stairs was held by the owner of 2308 Mar East subject to any encumbrances, including the encroachment that came to light.[5]

Both parties approach the breach of contract issue as a purely legal question. Although Handley argues in the alternative that, at a minimum, the trial court should have permitted the issue of contractual breach to go to the jury rather than direct a verdict for MER on liability, her principal argument is that she is entitled to a judgment in her favor as a matter of law. Neither party argues that the relevant extrinsic evidence was in conflict as to the meaning of the parties' contract, nor does either party identify any factual issue requiring the jury's resolution on the question of breach, and we perceive no such factual issues. Accordingly, the trial court not only erred in a directing a verdict for MER, but as a matter of law, based on the undisputed facts, Handley did not breach the parties' contract and so the court should have entered judgment in her favor and erred in denying her motion for JNOV.[6] (See *Parsons v. Bristol Development Co.* (1965)

---

[5] At oral argument, MER contended the stairs could not be "encumbered" by encroaching on the neighboring parcel because the two parcels shared a common owner. In support, it cited *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, which states that " '[A]n encumbrance, within the meaning of a covenant . . . [against encumbrances] had been defined as "any right to or interest in land which may subsist in third persons to the diminution of the value of the estate to the tenant, but consistently with the passing of the fee." ' " (*Id*. at p. 21, fn. 14.) The land presumably had been subdivided, though, and the property boundaries recorded. MER cites no authority that, in the circumstances here, a physical encroachment across a boundary line between two commonly owned parcels is not an encumbrance on the servient parcel. With MER having failed to brief this issue, extended analysis is unwarranted.

[6] It does not appear from anything the parties have cited to us that the specific language of section 12B was raised below, either in opposition to MER's motion for a directed verdict or in support of Handley's JNOV motion. The JNOV motion adequately raised the contention, though, that the parties contracted to place the risk of error here on the buyer even if the stairs are a fixture (stressing principally the contract's "as is" language and disclaimer of any representation as to property boundaries). Moreover, the contention that a judgment is unsupported by substantial evidence is an exception to the

62 Cal.2d 861, 865–866 [contractual interpretation solely a judicial function where there is no conflict in the extrinsic evidence].)

For the first time at oral argument, MER argued that entry of judgment in Handley's favor would not be appropriate because, at a minimum, the case should be remanded for trial on two other claims it pled that it contends are still outstanding: a claim for reformation of the contract (seeking a reduction in the purchase price on the basis of mutual mistake), and a claim for breach of a promise to convey an easement in the stairs. We have reviewed those portions of the record to which the parties at oral argument directed our attention (principally, the court's ruling from the bench on the motion for a directed verdict, its subsequent explanation of the ruling to the jury, and its later clarification of the ruling in response to a juror's inquiry), and it appears to us that the plaintiff, in effect, abandoned those claims. The reformation claim was nowhere mentioned. MER appears to have acquiesced in keeping from the jury its claim for breach of a promise to convey an easement, despite the court's ruling that the trial evidence raised factual issues.[7] And later on, MER did not mention either (supposedly unresolved) claim when opposing Handley's JNOV motion, which argued that the entire "lawsuit" was foreclosed by dispositive contract provisions and asked the court to enter a

---

general rule that issues not raised in the trial court are generally forfeited. (*Tahoe National Bank v. Phillips*, *supra*, 4 Cal.3d at p. 23, fn. 17.)

[7] Although the court's comments about its directed verdict rulings were in some respects unclear, it expressly ruled that "*I do not have enough evidence to grant a directed verdict on the breach of the easement agreement*. So either that needs to go to the jury for determination, or it can just go to a jury for the determination just on what I have the directed verdict on, the breach of the sale agreement, the failure to deliver the stairs." (Italics added.) At no time after that, despite many subsequent efforts to explain and/or clarify the ruling, did the court *prohibit* MER from submitting that easement claim to the jury. And at no time did MER *request* that the jury render a verdict on that claim, or otherwise object to submitting the case to the jury solely the question of damages. On the contrary, after some initial confusion about the scope of the court's directed verdict rulings, MER ultimately acquiesced in the court's view that it was unnecessary to submit the other contract claim to the jury, "just to simplify the case," because the damages were duplicative.

judgment in her favor. Indeed, the respondent's brief (at pages 47 and 48) repeatedly describes the easement claim as having been "dismissed." All of these circumstances lead us to conclude that, in effect, MER made a tactical choice to abandon those claims. (Cf. *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 702, fn. 8.) What is more, with MER having elected that course of action when it was within its ability to procure jury findings on the easement claim, it would be unfair to grant MER a second bite at the apple. Trial "is not a practice run to be scrapped in favor of a more complete proceeding in the event of an adverse judgment." (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575.)

Because we are reversing the judgment, the award of attorney fees and costs must also be reversed. (See *Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 263.)

DISPOSITION

The judgment, the order denying JNOV, and the order awarding contractual attorney fees and costs are reversed, and the matter is remanded with directions for entry of judgment in appellant's favor. Appellant shall recover her appellate costs.

STEWART, J.

We concur.

RICHMAN, Acting P. J.

MILLER, J.

Mar East Realty, LLC v. Handley (A152326; A152830)